

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Joanne M. Fiorito	:	
	:	
v.	:	C-2017-2610125
	:	
Pennsylvania Electric Company	:	

**INITIAL DECISION**

Before  
Jeffrey A. Watson  
Administrative Law Judge

**INTRODUCTION**

A residential customer filed a Formal Complaint (Complaint) seeking to prevent a public utility from replacing her existing electric meter with a smart meter, also known as a Radio Frequency (RF) meter or an Advanced Metering Infrastructure (AMI) meter, at her residence. The complaint will be dismissed for failure to prove by a preponderance of evidence that the proposed meter installation violates a Commission order, rule or regulation or constitutes unsafe or unreasonable service under 66 Pa.C.S. § 1501.

**HISTORY OF THE PROCEEDING**

On June 8, 2017, Joanne M. Fiorito (Complainant) filed a Complaint with the Pennsylvania Public Utility Commission (Commission) against Pennsylvania Electric Company (Penelec, Respondent or Company) alleging, *inter alia*, that due to Complainant's objection to having a smart meter installed at her home, Respondent has threatened to shut off her service and a representative of Respondent threatened to terminate service by calling Complainant on a Saturday morning at 9:27 a.m. from the representative's cell phone. Complainant averred that

smart meters are unsafe, present privacy concerns, are vulnerable to cyber threats, are inferior in quality to analog meters and present serious health concerns. Complainant further averred that she has concerns regarding radio frequency exposure from the smart meters. Complainant also alleged that her analog meter was certified and installed by a certified electrician and questioned whether the smart meters are properly certified and installed by certified electricians. Complainant also objects to the cost of implementing and installing the meters. Complainant further complained about the shut-off notice and the communication from Respondent regarding the threat to terminate her service. As relief, Complainant requests, *inter alia*, that the Commission order Respondent to forego installation of a smart meter at her residence, refrain from sending unsigned threatening letters, refrain from charging customers a surcharge fee and to resolve the issues raised in the Complaint.

On July 10, 2017, Respondent filed an Answer and New Matter to the Complaint, essentially admitting that Complainant's service is subject to termination for refusing to permit the exchange of her meter and denying the material allegations set forth in the Complaint. Respondent avers that Complainant has refused to permit technicians to install a smart meter in her home. Respondent further avers it is required by Act 129 of 2008,<sup>1</sup> to install a smart meter.

On July 10, 2017, Respondent also filed preliminary objections to the Complaint. Respondent essentially averred that Complainant did not allege any specific safety or health issue with the smart meter to be installed at the Service Location. Respondent averred that a prayer for relief to "opt out" of the installation of a smart meter is not legally recoverable in the cause of action, and was "impertinent matter" in the sense that it is irrelevant to the cause of action. Respondent also averred that holding a hearing in this proceeding was not in the public interest. Respondent averred that the Commission does not have the power to order the Company not to install a smart meter at the Service Location and Complainant's request to maintain her analog meter is an impertinent matter that must be stricken within the use and meaning of 52 Pa.Code § 5.101(a)(2). Finally, Respondent averred that Complainant failed to allege that Respondent violated a Public Utility Code provision, Commission regulation or order

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<sup>1</sup> 66 Pa.C.S. § 2806.1 *et seq.*

that can be the basis of any finding against the Company, and therefore was legally insufficient pursuant to 52 Pa.Code § 5.101(a)(4).

Complainant filed a response to the preliminary objections on July 19, 2017, essentially reiterating various averments set forth in her Complaint.

A Motion Judge Assignment Notice was issued on August 16, 2017, and assigned the undersigned presiding officer to this proceeding.

On August 29, 2017, an interim order was entered denying the preliminary objections filed by Pennsylvania Electric Company and the complaint was referred to mediation review. Ultimately, the case could not be resolved.

On March 14, 2018, a notice was issued which scheduled telephonic evidentiary hearings for May 30 and May 31, 2018.

The hearing convened as scheduled on May 30, 2018, and was concluded on May 31, 2018. Complainant represented herself and testified on her own behalf. Margaret A. Morris, Esquire, represented Respondent; John Ahr, Scott Palmquist and Michael Belanger appeared and testified on behalf of the Company. Witnesses Belanger and Palmquist were qualified as experts in their fields.

Upon conclusion of the hearing, the parties were advised that an order would be entered addressing a briefing schedule. On June 6, 2018, an interim order was entered permitting the parties to file main briefs in this proceeding on or before August 1, 2018, and reply briefs on or before August 13, 2018. On August 1, 2018, Respondent filed a brief. Complainant did not file a brief.

The record closed by interim order entered on August 16, 2018. This case is ripe for a decision.

## FINDINGS OF FACT

### Background

1. Complainant, Joanne M. Fiorito, resides at 173 Brookside Road, Tunkhannock, Pennsylvania (Service Location). Tr. 36.
2. Respondent is Pennsylvania Electric Company, an electric distribution company providing electric service to Pennsylvania customers. Respondent Exhibit 3.
3. On June 2, 2017, the Company forwarded a 10-day notice advising Complainant that her service was subject to termination on or after June 12, 2017 for refusing access for the installation of a smart meter. Termination was stayed on receipt of the Formal Complaint. Tr. 206-207; Respondent Exhibit 35, pp. 3-8.
4. As of the hearing date, Penelec has not installed an Advanced Metering Infrastructure meter commonly referred to as a smart meter, at the Service Location. Tr. 288.
5. As of the hearing date, Penelec continued to provide electric service to Complainant. Tr. 288.
6. Governor Edward Rendell signed Act 129 into law on October 15, 2008. Tr. 272; Respondent Exhibit 1; Respondent Exhibit 35.
7. Act 129 of 2008 requires all electric distribution companies with at least 100,000 customers to install smart meters throughout their service territories, within 15 years of the Commission Order. Tr. 266-267; Respondent Exhibits 1 and 2.
8. A smart meter has been defined as technology, including metering technology and network communications technology capable of bidirectional communication,

which records electricity usage on at least an hourly basis, including related electronic distribution system upgrades to enable this technology. Tr. 271; Respondent Exhibit 1.

9. Chapter 28 of Title 66 reflects changes made by Act 129. Tr. 272; Respondent Exhibit 1; Respondent Exhibit 35 pp. 1-2.

10. The *Smart Meter Implementation Order, In re: Smart Meter Procurement and Installation*, at Docket No. M-2009-2092655, was entered June 24, 2009. Tr. 273. Respondent Exhibits 1 and 2.

11. The *Smart Meter Implementation Order*, provides for AMI meters to include bidirectional communications, minimum hourly reads delivered at least once per day, remote programming capability, and the support of time-of-use and real-time pricing programs. The Commission ordered electric utilities with more than 100,000 customers to introduce smart meter technology and file a plan with the Commission by August 12, 2009. The utilities are permitted to recover all reasonable and prudent costs of providing this technology. Tr. 274; Respondent Exhibit 2.

12. Penelec's Smart Meter Technology Procurement and Installation Plan was filed with the Commission at Docket No. M-2009-2123950 on August 14, 2009. Tr. 275; Respondent Exhibit 3.

13. Penelec's Smart Meter Technology Procurement and Installation Plan was adopted on April 15, 2010 and entered on June 9, 2010. Tr. 276; Respondent Exhibit 4.

14. Pursuant to the Commission's Opinion and Order entered March 6, 2014, the First Energy Companies filed their Revised Deployment Plan at Docket No. M-2013-2341994 on March 19, 2014. Tr. 277-279; Complainant Exhibit 5 and Exhibit 6.

15. By Opinion and Order, entered June 5, 2014, the Commission approved Penelec's Revised Deployment Plan reflecting an expedited deployment schedule. Tr. 277, 280-281; Respondent Exhibit 5, 7.

16. The Commission's Secretarial Letter states that Penelec's Revised Deployment Plan and communication plan complied with the Commission's Order approving the plan. Tr. 282; Respondent Exhibit 8.

17. In its Revised Deployment Plan, Penelec proposed to deploy smart meters in its territory beginning in 2016. Tr. 280; Respondent Exhibit 6.

18. The AMI system allows for bidirectional communication between the meter and the Company. Tr. 278-279; Respondent Exhibit 5.

19. Penelec deploys the Itron OpenWay Centron smart meter. Tr. 279; Respondent Exhibit 5.

20. Act 129 does not include an "opt out" provision for smart meter installation. Tr. 283-285. Respondent Exhibits 1 and 23; Complainant Exhibit A.

21. Smart meters were deployed in Complainant's service area in July 2017, so there are no meter reading routes left in her area. Tr. 288.

22. As of August 2018, the Company no longer intends to employ meter readers to serve Complainant's area. Tr. 288.

23. Only early adopters of smart meters, who requested smart meter installation before the utility's official deployment, were required to pay the cost of the smart meter. Tr. 289-290; Respondent Exhibit 1; Complainant Exhibit A.

24. The Company has begun deployment so there is no cost to Complainant for smart meter installation. Tr. 289-290; Respondent Exhibit 5.

25. Under Penelec's Tariff Rules 7<sup>2</sup> and 8,<sup>3</sup> the Company owns, maintains, furnishes and installs the meters and may install the meters and related equipment it deems reasonable and appropriate to provide service to customers under the tariff. Tr. 290-291; Respondent Exhibit 22.

26. Under its Tariff Rule 9,<sup>4</sup> the Company has the right to access a customer's premise to remove or exchange any or all Company equipment including a meter. Tr. 291; Respondent Exhibit 22.

27. Tariff Rule 20,<sup>5</sup> 52 Pa.Code § 56.81 and 66 Pa.C.S. § 1406 allow the Company to terminate service for denying access to the meter. Tr. 291-292; Respondent Exhibit 21; Respondent Exhibit 22.

### Privacy

28. Penelec is required to comply with all aspects of the approved Privacy Policy consistent with the Commission's Secretarial Letter, dated May 1, 2015. Tr. 295; Respondent Exhibit 10.

29. The smart meter network includes a number of security protections to prevent against the unauthorized access of a customer's usage data including encryption, firewalls, password protection and continuous security monitoring. Tr. 294; Respondent Exhibit 9.

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<sup>2</sup> Electric Pa. P.U.C. No. 81 (Supp. 35), Second Revised Page 42, Superseding First Revised page 42, Original Page 61, issued January 25, 2017; effective January 27, 2017.

<sup>3</sup> Electric Pa. P.U.C. No. 81, Original Page 45, issued May 1, 2015; effective May 3, 2015.

<sup>4</sup> Electric Pa. P.U.C. No. 81, Original Page 45, issued May 1, 2015; effective May 3, 2015.

<sup>5</sup> Electric Pa. P.U.C. No. 81, Original Page 60, issued May 1, 2015; effective May 3, 2015.

30. Penelec does not sell customer usage data or personal information. Tr. 295; Respondent Exhibit 9.
31. Scott Palmquist is employed by Itron, Inc., as a Senior Product Line Manager for Smart Grid Security and Networking. Tr. 309; Respondent Exhibit 27.
32. Mr. Palmquist presented expert testimony that the cyber security protections in place on Penelec's smart meter system adequately protect against unauthorized access to customers' usage information. Tr. 327-328.
33. Itron utilizes multiple layers of cyber security protections, specifically including two-way encryption to ensure there is no unauthorized disclosure of information and digital signatures to ensure the meter can only operate on an authorized message from the utility data center. Tr. 316; Respondent Exhibit 29.
34. The smart meter traffic remains encrypted until it is processed by the utility head and data collection system. Tr. 320; Respondent Exhibit 29.
35. Penelec can observe when a customer's electricity use increases and decreases over the course of a day. Tr. 313-314; Respondent Exhibit 6.
36. No forms of personal identifiable information are transmitted through the smart meter network. Tr. 293-294, 314, 329; Respondent Exhibit 9.
37. The Itron smart meter network is composed of the Home Area Network, Regional Area Network, Local Area Network, Wide Area Network and Field Area Network. Tr. 316-319; Respondent Exhibit 29.
38. A customer may request a Home Area Network, which allows qualified home devices to display energy usage information. Tr. 317; Respondent Exhibit 29.

39. Qualified Home Area Network devices must have a digital certificate, which is used to establish a secure encrypted connection between the home device and the smart meter. Tr. 317; Respondent Exhibit 29.

40. All smart meters are equipped with the Local Area Network zone, which is the mesh network of smart meters under a field-deployed router. The meters send their data to the field router, which in turn sends the data to the utility data center. Tr. 317-318; Respondent Exhibit 5.

41. The Regional Area Network is a collection of many Local Area Networks. Tr. 318; Respondent Exhibit 29.

42. The Local Area Network zone and Regional Area Network zone utilize the same cyber security protections. Smart meters only respond to authorized commands from the utility data center and all smart meter data is encrypted. The mesh network is also encrypted. Tr. 318-319; Respondent Exhibit 29.

43. The Wide Area Network is the connection back to the utility data center for the smart meters in the Local Area and Regional Area Networks. Tr. 319; Respondent Exhibit 29.

44. The Wide Area Network is the connection back to the utility data center from the field area routers or the smart meter; these connections carry the encrypted meter traffic and add an additional layer of encryption between the field router and the utility data center. Tr. 319-320; Respondent Exhibit 29.

45. Cisco's bidirectional communication field area network solutions are used throughout the Itron communication network. Tr. 321; Respondent Exhibit 18.

46. The Cisco Field Area network solutions provide security controls that include hiding network addresses, authenticating devices and an interface that is allowed to use

the network, monitoring traffic flows and providing classes of services for different priorities of traffic. Tr. 321; Respondent Exhibit 18.

47. The Cisco solution reduces system vulnerability to physical or cyber-attack; it provides operating resiliency against security disruptions; and it provides highly secure access and data privacy for smart grid information. Tr. 322; Respondent Exhibit 18.

48. The National Institute of Standards and Technology (NIST) is a nationally recognized organization that recommends guidelines for cyber security protections for smart meter networks. Tr. 324; Respondent Exhibit 20.

49. The NIST IR 7628 provides Guidelines for Smart Grid security. Tr. 324-325; Respondent Exhibit 20.

50. NIST FIPS Publication 197 includes the encryption standard (Advanced Encryption Standard – AES) used by Itron smart meters. Tr. 325; Respondent Exhibit 20.

51. NIST FIPS Publication 186 defines the digital signature standard used by Itron smart meters. Tr. 325; Respondent Exhibit 20.

52. Itron follows the smart meter guidance set forth in the publication NIST IR 7628. Tr. 325; Respondent Exhibit 20.

53. The North American Electric Reliability Corporation (NERC) is a federal organization created by the Federal Energy Regulatory Commission to develop and maintain critical infrastructure protection requirements for the electric grid. Tr. 326; Respondent Exhibit 20.

54. NERC has developed standards, known as critical infrastructure protection (CIP), which discuss various requirements for reliable generation and transmission of electricity. Tr. 326; Respondent Exhibit 20.

55. NERC standards are not binding on distribution facilities, such as Penelec's smart meter network. Tr. 326-327.

56. Itron's smart meters adhere to NERC standards. Tr. 327.

57. Michael Belanger is employed by Itron, Inc. as a Senior Product Line Manager for Network Communications. Tr. 345; Respondent Exhibit 26.

58. Mr. Belanger presented expert testimony that RF emissions from smart meters are safe, as they produce an RF field that is less than 1% of the Federal Communications Commission (FCC) safe exposure level. Tr. 373; Respondent Exhibit 13.

59. Itron smart meters exceed all applicable RF safety standards. Tr. 355; Respondent Exhibit 12.

60. The 900 MHz LAN radio is the main smart meter network communication component for establishing two-way communications. Tr. 353; Respondent Exhibit 14.

61. The 2.4 GHz Zigbee radio is the component used to communicate with any in-home device for a Home Area Network. Tr. 353; Respondent Exhibit 15.

62. The Zigbee radio is not a mandatory component of smart meter installation. Tr. 353-354; Respondent Exhibit 15.

63. An RF transmission is emitted from the smart meter through the mesh network, then to a cellular network and back to the Company. Tr. 354; Respondent Exhibit 12.

64. On average, AMI meter transmissions last approximately 150 milliseconds or less than 0.15 seconds. Tr. 354-355; Respondent Exhibit 12.

65. In a 24-hour period, the total transmission time for the average smart meter is under 3 minutes. Tr. 355; Respondent Exhibit 12.

66. Radio frequency waves are inevitable because nearly all commonly-used electronic devices emit radio frequency waves while operating. Tr. 356; Respondent Exhibit 12.

67. Ms. Fiorito has a computer, cordless phone, microwave and cell phone in her home. Tr. 203; 218-219; Respondent Exhibit 17.

68. Typically a cordless phone emits 0.12 milliwatts of radio frequency per square centimeter. Complainant Exhibit A, at p. 3.

69. Typically a microwave oven emits 0.0047 milliwatts of radio frequency per square centimeter. Complainant Exhibit A, at p. 3.

70. Typically a cell phone emits 0.19 milliwatts per square centimeter. Complainant Exhibit A, at p. 3.

71. A computer will emit unintentional radiofrequency transmissions. Tr. 356.

72. Typically RF exposure increases when a microwave is in use or near a wireless router. Tr. 371-372; Respondent Exhibit 13.

73. Typically RF field exposure in a kitchen, while the microwave was operating, increased to up to 22% of the maximum permissible exposure limit. Tr. 371; Respondent Exhibit 13.

74. Typically wireless routers in the home create RF fields in the range of 0.02 to 0.03% of the maximum permissible exposure limit. Tr. 372; Respondent Exhibit 13.

75. Part 15.247 of the FCC regulations has indicated that maximum permissible exposure to radiofrequency fields emitted by an Itron meter is 0.61 milliwatts per square centimeter for the 900 MHz LAN radio and 1.00 milliwatts per square centimeter for the Zigbee radio. Tr. 358-359; Respondent Exhibit 24.

76. Penelec's Itron smart meter's 900 MHz LAN radios comply with the FCC's regulations for unintentional radiofrequency emissions. Tr. 365; Respondent Exhibit 14.

77. Penelec's Itron smart meter's 2.4 GHz Zigbee radios comply with the FCC's regulations for unintentional or spurious radio frequency radiation. Tr. 366; Respondent Exhibit 15.

78. The maximum power density level of the two radios in the smart meter equals 0.258 when summed, which is below the limits for each radio. Tr. 368; Respondent Exhibit 16.

79. From one foot away from an end point smart meter, the RF field is not expected to exceed 0.8% of the maximum permissible exposure limit. Tr. 370-371; Respondent Exhibit 13.

80. From ten feet away from a smart meter, the RF field is significantly smaller, at about 0.008% for the meter. Tr. 371; Respondent Exhibit 13.

## DISCUSSION

### Legal Standards

Under Section 332(a) of the Public Utility Code, 66 Pa.C.S. § 332(a), "the proponent of a rule or order has the burden of proof." It is well-established that "[a] litigant's burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible."

*Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600, 602 (Pa.Cmwlth. 1990). The preponderance of evidence standard requires proof by a greater weight of the evidence. *Commonwealth v. Williams*, 557 Pa. 207, 732 A.2d 1167 (1999). This standard is satisfied by presenting evidence more convincing, by even the smallest amount, than that presented by another party. *Brown v. Commonwealth*, 940 A.2d 610, 614 n.14 (Pa.Cmwlth. 2008).

If the party seeking a rule or order from the Commission sets forth a *prima facie* case, then the burden shifts to the opponent. *MacDonald v. Pa. R.R. Co.*, 348 Pa. 558, 36 A.2d 492 (1944). Establishing a *prima facie* case requires either evidence sufficient to make a finding of fact permissible or evidence to create a presumption against an opponent which, if not met, results in an obligatory decision for the proponent. Once a *prima facie* case has been established, if contrary evidence is not presented, there is no requirement that the party seeking a rule or order from the Commission must produce additional evidence to sustain its burden of proof. See *Replogle v. Pa. Elec. Co.*, 54 Pa. PUC 528, 1980 Pa. PUC LEXIS 20 (Order entered Oct. 9, 1980); see also *Dist. of Columbia's Appeal*, 21 A.2d 883 (Pa. 1941); *Application of Pennsylvania-American Water Co. for Approval of the Right To Offer, Render, Furnish or Supply Water Serv. to the Pub. in Additional Portions Of Mahoning Twp., Lawrence County, Pa.*, Docket No. A-212285F0148, 2008 Pa. PUC LEXIS 874 (Order entered Oct. 29, 2008).<sup>6</sup>

In smart meter related matters, the Commission has held that “[t]he Complainant will have the burden of proof during the proceeding to demonstrate, by a preponderance of the evidence, that [the utility] is responsible or accountable for the problem described in the Complaint.” *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064, p. 18 (Order entered Sept. 3, 2015); see also *Romeo v. Pa. Pub. Util. Comm'n*, 154 A.3d 422, 429 (Pa.Cmwlth. 2017)

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<sup>6</sup> In addition, any finding of fact necessary to support an adjudication of the Commission must be based upon substantial evidence. *Met-Ed Indus. Users Grp. v. Pa. Pub. Util. Comm'n*, 960 A.2d 189, 193 n.2 (Pa.Cmwlth. 2008) (citing 2 Pa.C.S. § 704). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Borough of E. McKeesport v. Special/Temporary Civil Serv. Comm'n*, 942 A.2d 274, 281 n.9 (Pa.Cmwlth. 2008) (citation omitted). Although substantial evidence must be “more than a scintilla and must do more than create a suspicion of the existence of the fact to be established,” *Kyu Son Yi v. State Bd. of Veterinary Med.*, 960 A.2d 864, 874 (Pa.Cmwlth. 2008) (citation omitted), the “presence of conflicting evidence in the record does not mean that substantial evidence is lacking.” *Allied Mech. and Elec., Inc. v. Pa. Prevailing Wage Appeals Bd.*, 923 A.2d 1220, 1228 (Pa.Cmwlth. 2007) (citation omitted).

(finding that the smart meter complainant should have a hearing to try to prove his claim through “the testimony of others as well as other evidence that goes to that issue”).

When presented with a challenge to an AMI meter installation, the Commission has pronounced that “[t]he ALJ’s role . . . will be to determine based on the record in this particular case, whether there is sufficient evidence to support a finding that Complainant was adversely affected by the smart meter or whether [the utility’s] use of a smart meter will constitute unsafe or unreasonable service in violation of Section 1501 under the circumstances in this case.” *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064 at 23 (Order entered Jan. 28, 2016) (citing *Woodbourne-Heaton*, 1992 Pa. PUC Lexis 160, at \*12-13). *Frompovich v. PECO Energy Co.*, Docket No. C-2015-2474602, (Opinion and Order entered May 3, 2018 at 10).

Section 701 of the Public Utility Code provides that “any person . . . having an interest in the subject matter . . . may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission.” 66 Pa.C.S. § 701. Therefore, a complainant must generally demonstrate that the public utility violated the Public Utility Code or a Commission regulation or order.

Section 1501 of the Public Utility Code states, in pertinent part, that:

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this part and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service. . . .

66 Pa.C.S. § 1501. The Commission has exclusive jurisdiction to adjudicate “issues involving the reasonableness, adequacy, and sufficiency” of a public utility’s facilities and services. *See Elkin v. Bell of Pa.*, 420 A.2d 371, 374 (Pa. 1980) (citations omitted).

A public utility’s Commission-approved tariff is *prima facie* reasonable, has the full force of law and is binding on the utility and the customer. 66 Pa.C.S. § 316, *Kossmann v. Pa. Pub. Util. Comm’n*, 694 A.2d 1147 (Pa.Cmwlth. 1997) (*Kossmann*); and *Stiteler v. Bell Telephone Co. of Pennsylvania*, 379 A.2d 339 (Pa.Cmwlth. 1977) (*Stiteler*).

### Record Evidence

Complainant provided testimony in support of her Complaint and testified, *inter alia*, that Act 129 does not mandate smart meters and is unlawful, and smart meters pose privacy concerns. Complainant Exhibits A, B, C, D, E and G were admitted into evidence.

Although Complainant’s request to admit Complainant Exhibit H into evidence was denied, judicial notice was taken with regard to Complainant Exhibit H, the opinion and order entered in *Hallowich v. Range Resources Corp., et al.*, CCP Washington County No. 2010-3954. Tr. 184.

Three witnesses testified on behalf of Penelec. John Ahr, Manager of Regulatory Compliance for Smart Meter, testified regarding the mandates in Act 129, regulatory requirements for smart meter plans in Pennsylvania, Penelec’s Smart Meter Deployment Plan, the general features of Penelec’s smart meters, and the Company’s attempts to install a smart meter at the Service Location. Michael Belanger and Scott Palmquist also testified on behalf of the Company. Scott Palmquist, Senior Product Line Manager for Smart Grid Security and Networking, was qualified, without objection, to provide expert evidence in the fields of advanced metering and network cyber security. Michael Belanger, Senior Product Line Manager for Network Communications, was qualified, without objection, to provide expert evidence in the design, operation, communication and technology associated with the Itron advanced

metering communication and transmission system. In addition, Respondent Exhibits 1-10, 12-18, 20-21, 23-27, 29 and 35 were admitted into evidence.<sup>7</sup>

### Smart Meter Mandate

Complainant alleges, *inter alia*, that the installation of a smart meter is not mandated by the Code; the smart meter technology raises privacy concerns in violation of Section 1501 of the Code; and her service should not be subject to termination for failure to permit installation of the smart meter.

Pursuant to 66 Pa.C.S. Section § 1501, public utilities have a duty to maintain safe, adequate and reasonable service and facilities and to make repairs, changes, and improvements that are necessary or proper for the accommodation, convenience and safety of its patrons, employees and the public.

Complainant testified that Act 129 is not lawful and the installation of a smart meter is not mandated based on the following arguments:

- Smart meters are not mandated<sup>8</sup> pursuant to *Senatus Consultum*<sup>9</sup> since three senators stated in comments before voting that there was no smart meter mandate.<sup>10</sup>
- The Senate and the House of Representatives made decisions beyond their capacity to turn power over to the PUC.<sup>11</sup>

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<sup>7</sup> Respondent's Exhibits are not sequential.

<sup>8</sup> Tr. 37-38; 54; 61; 65-66; 126-128.

<sup>9</sup> Complainant testified that "*Senatus Consultum*" is defined by Black Law's Dictionary as "having the full force of the law without concurrence of the people." Tr. 128. The definition was not offered into evidence.

<sup>10</sup> Tr. 102-105; 127; Complainant Exhibits D and E.

<sup>11</sup> Tr. 38.

- The PUC overrode the senators’ votes and acted without authority.<sup>12</sup>
- Citizens are improperly classified as customers in Act 129.<sup>13</sup>
- Section 2807(f)(2)(i) and (ii) states a smart meter can only be installed at the customer’s request and if the customer agrees to pay or new construction.<sup>14</sup>

Penelec presented testimony that it has an obligation to install smart meters at all of its customers’ service locations under Act 129.<sup>15</sup> Act 129 does not provide any language that permits customers to “opt out” from smart meter installation.<sup>16</sup>

On October 15, 2008, Act 129 was signed into law and codified at Chapter 28 of the Code.<sup>17</sup> Act 129 required EDCs with at least 100,000 customers, such as Penelec, to file a smart meter technology procurement and installation plan (SMP Plan) with the Commission for approval.<sup>18</sup> Specifically, Section 2807(f)(2) of the Code directed EDCs to furnish smart meter technology as follows: (1) upon request from a customer that agrees to pay the cost of the smart meter at the time of the request; (2) in new building construction; and (3) in accordance with a depreciation schedule not to exceed fifteen years.<sup>19</sup>

Pursuant to Section 2807(f) of the Code, Penelec and the other FirstEnergy EDCs<sup>20</sup> in Pennsylvania (collectively, the Companies) filed their Joint Petition for Approval of

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<sup>12</sup> Tr. 226-227.

<sup>13</sup> Tr. 74.

<sup>14</sup> Tr. 95; 97; Complainant Exhibit B.

<sup>15</sup> Tr. 283-284; Respondent Exhibit 1.

<sup>16</sup> Complainant Exhibit A; Respondent Exhibits 2 and 23.

<sup>17</sup> Respondent Exhibit 1.

<sup>18</sup> Tr. 273; Respondent Exhibit 1.

<sup>19</sup> Tr. 268; Respondent Exhibit 1.

<sup>20</sup> The other First Energy companies are Metropolitan Edison Company, Pennsylvania Power Company and West Penn Power Company.

Smart Meter Technology Procurement and Installation Plan on August 14, 2009 (2009 SMP Plan).<sup>21</sup> By Order, entered June 9, 2010, the Commission approved the Companies' 2009 SMP Plan with modifications.<sup>22</sup> On December 31, 2012, the Companies filed their Joint Petition for Approval of their Smart Meter Deployment Plan (Deployment Plan).<sup>23</sup> On March 19, 2014, the Companies submitted their Revised Deployment Plan,<sup>24</sup> which *inter alia* accelerated the smart meter deployment schedule originally laid out in their Deployment Plan.<sup>25</sup> As Mr. Ahr testified, under the Revised Deployment Plan, Pennsylvania Power Company proposed to deploy smart meters by early 2016.<sup>26</sup> In its Opinion and Order,<sup>27</sup> entered June 25, 2014, the Commission approved the Revised Deployment Plan.

Complainant also argues that Act 129 specifically allows a customer to “opt out” of smart meter deployment. Complainant points to Section 2807(f)(2)(i) of the Code for the proposition that the deployment of smart meters for individual customers occurs only upon request of the individual customer. Therefore, she argues that smart meters are to be installed at the request of the customer and are not mandated.<sup>28</sup>

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<sup>21</sup> *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company for Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123950, filed August 14, 2009; Tr. 274-275. Respondent Exhibit 3.

<sup>22</sup> Tr. 276; Respondent Exhibit 4.

<sup>23</sup> *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Their Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, M-2013-2341994, Smart Meter Deployment Plan, filed December 31, 2012.

<sup>24</sup> *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Their Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, M-2013-2341994, Smart Meter Deployment Plan, filed June 16, 2014.

<sup>25</sup> Tr. 281; Respondent Exhibit 5.

<sup>26</sup> Tr. 289.

<sup>27</sup> *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Their Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, M-2013-2341994 (Opinion and Order entered June 25, 2014).

<sup>28</sup> Tr. 70-71; 95-99.

Ms. Fiorito's interpretation of Section 2807(f) of the Code<sup>29</sup> is incorrect. Section 2807(f)(2) provides:

(2) Electric distribution companies shall furnish Smart Meter technology<sup>30</sup> as follows:

(i) Upon request from a customer that agrees to pay the cost of the Smart Meter at the time of the request.

(ii) In new building construction.

(iii) In accordance with a depreciation schedule not to exceed 15 years.

Company witness Ahr testified that the Company's Revised Deployment Plan, as approved by the Commission, provides for all customers to receive smart meters on or before December 31, 2022.<sup>31</sup> This full deployment has two distinct implementation timelines. The great majority of customers (98.5%) will receive smart meters by mid-2019, with the remaining 1.5% of customers to receive installation by December 31, 2022.<sup>32</sup> Penelec's Commission-approved Revised Deployment Plan, provides in pertinent part as follows:

The Full-Scale Deployment Stage will commence upon resolution of all problems encountered during the Solution Validation Stage and will continue until all meters are installed on or before December 31, 2022. During this stage, the remainder of the smart meter infrastructure will be concurrently built in each of the Companies' respective service territories, starting with the most populated areas first. All remaining smart meters will be installed during this Stage at an anticipated meter installation rate of 1,900 meters per day, five days per week, and potentially ramping up to 3,000 meters per day if circumstances and conditions warrant. At

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<sup>29</sup> 66 Pa.C.S. § 2807(f)(2)(i).

<sup>30</sup> Smart Meter Technology is defined in the Code at 66 Pa.C.S. § 2807(g).

<sup>31</sup> Tr. 286.

<sup>32</sup> Tr. 286-287; Respondent Exhibit 7.

this pace, the Companies expect to install approximately 98.5% of all meters by mid-2019, with the remaining 1.5% of the meters being installed thereafter through December 31, 2022. The 1.5 % of the installations represent those installations that may require alternative communication solutions or difficult to reach locations such as remote hunting cabins. Any similar situations discovered in Penelec’s service territory are included in the 1.5% estimate and will be addressed in the time frame discussed above.<sup>33</sup>

Section 2807(f)(2)(i) allows EDCs to provide smart meters to those customers requesting a smart meter in advance of the EDC’s official roll-out.<sup>34</sup> In that situation, the customer would be required to pay the cost of the smart meter in full at the time of the request.<sup>35</sup> Penelec may recover all of its reasonable and prudent cost of providing smart meter technology.<sup>36</sup> Section 2807(f)(2)(iii) of the Code requires the deployment of smart meters throughout the remainder of an EDC’s service territory in those instances where the EDC did not already provide a smart meter at the customer’s request (before the EDC’s official roll-out) or the EDC did not already provide a smart meter as part of new construction.<sup>37</sup>

There is no record evidence to support Complainant’s position that there is an “opt out” provision contained in the Code. Furthermore, the Commission has ruled that neither the Companies’ Commission-approved Revised Deployment Plan nor Act 129 permit such “opt outs” to occur and dismissed formal complaints on that basis.<sup>38</sup>

Complainant’s claim that there is an “opt out” provision in Act 129 is based upon her interpretation of the statute and legislative history. Complainant’s personal opinions or

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<sup>33</sup> Respondent Exhibit 5, pp. 47-48.

<sup>34</sup> Tr. 269.

<sup>35</sup> Tr. 269.

<sup>36</sup> Tr. 274; Respondent Exhibit 2.

<sup>37</sup> Tr. 269; Respondent Exhibit 1.

<sup>38</sup> Tr. 284-285; Respondent Exhibit 23.

perceptions do not constitute evidence. Personal opinion, no matter how strongly held, does not constitute evidence.<sup>39</sup> Even a *pro se* complainant must provide relevant and necessary information.<sup>40</sup> Other than providing her personal interpretation of the statute, Complainant presented no credible or competent evidence to support her claim. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.<sup>41</sup>

The Commission has ruled that there is no provision in the Code, the Commission's regulations or Orders that permit a Penelec customer to "opt-out" of smart meter installation. 66 Pa. C.S. § 2807(f); See *Frompovich v. PECO Energy Co.*, Docket No. C-2015-2474602 (Opinion and Order entered May 3, 2018). Moreover, the Commonwealth Court has held that federal law does not preempt the Commission's interpretation. See *Romeo v. Pa. Pub. Util. Comm'n*, 154 A. 3d 422 (Pa.Cmwlth. 2017).

Based upon the statutory mandate and *stare decisis*, a Penelec customer's allegation that the installation of a smart meter is not mandated by the Code is without merit and, based upon the record evidence, Complainant's requested relief must be dismissed. Penelec must install a smart meter at the Service Location to remain in compliance with Chapter 28 of the Code, related Commission orders and its Commission-approved Revised Smart Meter Deployment Plan.

### Cyber Security and Privacy Issues

In her Complaint, Complainant averred, *inter alia*, that smart meters present privacy concerns and are vulnerable to cyber threats.

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<sup>39</sup> *Pennsylvania Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987).

<sup>40</sup> *Groch v. Unemployment Comp. Bd. of Review*, 472 A.2d 286 (Pa.Cmwlth. 1984); *Vann v. Unemployment Comp. Bd. of Review*, 494 A.2d 1081 (Pa. 1985).

<sup>41</sup> *Norfolk and Western Ry. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 194 Pa. Super. 278, 166 A.2d 96 (1960); *Murphy v. Commonwealth, Dept. of Public Welfare, White Haven Center*, 85 Pa.Cmwlth. 23, 480 A.2d 382 (1984).

At the hearing, Complainant complained of alleged cyber security and privacy issues. Specifically, she testified that:

“...this meter has a flaw in it that allows people to not only assume an identify of an account and get access to people’s account number through the mail or however they get it, so they can assume that you are – the Company, they can put an application in saying that we want electricity at so and so, use this account number, and give them a bogus address. And the Company, if you are lucky, will look it up. They can-which means they can clone the account basically is what-assume the identity of another. And you’ll end up getting a debt after they move on from that account to another one. So that, to me, is presenting a big problem.”<sup>42</sup>

On May 1, 2015, the Commission approved Penelec’s Customer Privacy Policy Regarding Protection of Smart Meter Information (Privacy Policy),<sup>43</sup> which outlines all of the privacy protections adhered to by Penelec in its deployment of smart meters.<sup>44</sup> These protections provide that no sensitive customer information, such as the customer’s name, address, Social Security number, driver’s license number, employer identification number, date of birth, credit card number, passport number or bank account number, is accessible through Penelec’s smart meter network.<sup>45</sup> The only customer information collected by the Company’s smart meters is the Service Location usage data.<sup>46</sup> In the same respect as an analog meter, the smart meter is unable to determine what the individual sources of the electric usage are, only the total amount of electricity consumed and recorded by the installed meter at the property for a period of time.<sup>47</sup> The Privacy Policy also specifies how it protects against unauthorized access to usage

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<sup>42</sup> Tr. 46.

<sup>43</sup> *Smart Meter Customer Privacy Policy for Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, and M-2013-2341994 (Sec. Letter dated May 1, 2015).

<sup>44</sup> Respondent Exhibit 10.

<sup>45</sup> Tr. 293-295; Respondent Exhibit 9.

<sup>46</sup> Tr. 313-314.

<sup>47</sup> Tr. 313-314.

information within its smart meter network through cyber security tools, including encryption, firewalls, password protection and continuous security monitoring.<sup>48</sup> In addition, Penelec’s smart meter network adheres to the cyber security standards developed and published by the North American Energy Standards Board and the National Institute of Standards and Technology.<sup>49</sup>

Complainant offered no evidence that the Privacy Policy and related smart meter privacy protections were unreasonable. Other than asserting allegations related to unauthorized access to the smart meter network, Complainant failed to provide any testimony or other evidence establishing that the installation of a smart meter would constitute unreasonable service. The claims asserted by Complainant were based on what she has read on the internet related to smart meters.<sup>50</sup> Although the Pennsylvania Rules of Evidence are not strictly adhered to at the Commission, the Pennsylvania Supreme Court has stated that any relaxation of the rules of evidence in administrative settings cannot allow lay witnesses to testify to technical matters “without personal knowledge or specialized training.”<sup>51</sup> Lay witness testimony only carries evidentiary weight where the witness has actually perceived the situation, and the opinion is not based on scientific, technical or specialized knowledge.<sup>52</sup> Complainant did not establish that she has any personal knowledge or specialized training related to smart meters, cyber security or related privacy issues. Accordingly, Complainant’s testimony regarding these matters failed to support her claims that the installation of a smart meter violated any Commission rule, regulation or order or that Respondent provided unreasonable or inadequate service.

Company witness Ahr testified about which requirements for smart meter technology are required under the Code. In its *Implementation Order*, the Commission listed the

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<sup>48</sup> Respondent Exhibit 9.

<sup>49</sup> Tr. 325.

<sup>50</sup> Tr. 169-170.

<sup>51</sup> *Gibson v. W.C.A.B.*, 861 A.2d 938, 947 (Pa. 2004) (holding Rules of Evidence 602, 701 and 702 generally applicable in agency proceedings).

<sup>52</sup> Pa.R.E. 701.

functionality requirements for smart meters, which include the provision of bidirectional data communications capabilities, a minimum of hourly reads delivered at least once per day, remote programming capability and support of time-of-use and real-time pricing programs.<sup>53</sup>

Penelec's Revised Deployment Plan, as approved by the Commission, identifies how Penelec's smart meter technology was chosen, the features and characteristics of smart meter technology, the communication process between the smart meters and Penelec, and the costs and savings associated with the deployment of smart meters. Penelec provided testimony explaining that it chose its smart meter technology by conducting multiple requests for information and requests for proposals from vendors of smart meter systems and equipment.<sup>54</sup> The smart meter and communication network and supporting systems, referred to as AMI, allows for bidirectional communication between the meters and Penelec, the interval consumption of electricity, and allows for the transmission of meter readings over a communication network to a central collection point and supporting systems.<sup>55</sup> The specific type of AMI used by Penelec is the Itron Open-Way Centron Meter. Itron is the manufacturer of Penelec's smart meters, as well as the vendor in charge of the smart meter communication system.<sup>56</sup>

Witnesses Ahr and Palmquist both testified that there is no personal information in the smart meter system.<sup>57</sup> The smart meter can communicate a customer's total electric usage to Penelec but not what is causing the usage.<sup>58</sup> Witness Palmquist presented expert testimony regarding the cyber security goals and protections of the Itron AMI, namely confidentiality, integrity and availability.<sup>59</sup> He provided details of the multiple layers of cyber security

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<sup>53</sup> Tr. 274; Respondent Exhibit 2.

<sup>54</sup> Tr. 278; Respondent Exhibits 9 and 10.

<sup>55</sup> Tr. 278-279.

<sup>56</sup> Tr. 279.

<sup>57</sup> Tr. 294; 329.

<sup>58</sup> Tr. 292.

<sup>59</sup> Tr. 315.

protections.<sup>60</sup> In addition, he offered his expert opinion that the cyber security protections provided by the Cisco field area network provide adequate cyber security protections since the meter data is encrypted and all meter devices must be authenticated to even join the mesh network.<sup>61</sup> Witness Ahr testified that a smart meter does not record and transmit personal information and that the transmission is strictly limited to the usage information.<sup>62</sup>

Based upon the record evidence in this proceeding, Complainant's claims regarding privacy concerns are not supported by the record evidence and must be dismissed.

### Safety Issue

In her Complaint, Complainant averred that smart meters are unsafe, are inferior in quality to analog meters and present serious health concerns. Complainant further averred that she has concerns regarding radio frequency exposure from the smart meters. Complainant averred that her analog meter was certified and installed by a certified electrician and questioned whether the smart meters are properly certified and installed by certified electricians.

During her direct testimony, Complainant did not offer any testimony to support the safety issues raised in her Complaint.

Based upon the evidence presented in this proceeding, Complainant's claims regarding safety issues are not supported by the record evidence and must be dismissed.

### Threat of Termination

Complainant complained about the shut-off notice from Respondent regarding the proposed termination of her service that Complainant characterized as threats. Complainant

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<sup>60</sup> Tr. 315-320; Respondent Exhibit 29.

<sup>61</sup> Tr. 323; Respondent Exhibit 18.

<sup>62</sup> Tr. 314.

requested that the Company be ordered not to send termination notices to her.<sup>63</sup> However, she offered no evidence to support her position and request for relief.

The Code authorizes Penelec to terminate Complainant's service, after due notice, for failure to permit access to meters, for the purpose of replacement, maintenance, repair or meter reading.<sup>64</sup> The Commission's Regulations, at 52 Pa.Code § 56.81(3), provide, in pertinent part, the following:

A public utility may notify a customer and terminate service provided to a customer after notice as provided in §§ 56.91-56.100 (relating to notice procedures prior to termination) for any of the following actions by the customer . . . Failure to permit access to meters, service connections or other property of the public utility for the purpose of replacement, maintenance, repair or meter reading.

As Respondent explained, it is well-settled that where a customer refuses a utility access to its meter, the utility may terminate service after required notice is provided.<sup>65</sup> Additionally, Penelec's Tariff Rule 9,<sup>66</sup> states that the customer shall grant the Company's employees or agents access to their premises at all reasonable times for any and all purposes . . . or exchanging any and all equipment belonging to the Company.<sup>67</sup> Penelec's Tariff Rule 20,<sup>68</sup> permits the Company to begin the termination process for failure to permit access to remove or

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<sup>63</sup> Tr. 227-228.

<sup>64</sup> 66 Pa.C.S. § 1406(a)(4).

<sup>65</sup> *Art Larson v. PECO Energy Company*, Docket No. C-2014-2451754 (Opinion and Order entered June 11, 2015). *See also, Catherine J. Frompovich v. PECO Energy Company*, Docket No. C-2015-2474602 (Opinion and Order entered May 3, 2018).

<sup>66</sup> Electric Pa. P.U.C. No. 81, Original Page 45, issued May 1, 2015; effective May 3, 2015.

<sup>67</sup> Tr. 291; Respondent Exhibit 21.

<sup>68</sup> Electric Pa. P.U.C. No. 81, Original Page 60, issued May 1, 2015; effective May 3, 2015.

exchange the meter.<sup>69</sup> A public utility's Commission-approved tariff is *prima facie* reasonable, has the full force of law and is binding on the utility and the customer.<sup>70</sup>

Complainant has failed to carry her burden of proof that Penelec's actions in sending a termination notice and communicating its intent to terminate service violated the Code, Commission regulation or order. Complainant's requested relief must be dismissed.

#### Service Related and Miscellaneous Claims

In addition, at the hearing, Complainant alleged that the proposed smart meter installation constituted, "a deprivation of her rights under color of law", as she is being denied her choice to refuse a smart meter. Tr. 37, 42, 54, 57. Complainant testified that she believed there was fraud related to requiring the installation of smart meters and collusion between the state and the industry. Complainant also testified as to her belief that *senatus consultum* allows two or more senators to make a decision which serves to defend the rights of the public. In this case, the decision was to permit customers to have the ability to choose not to have a smart meter installed at their property. Tr. 41-42. At the hearing, Complainant did not offer any competent or credible evidence to support any of these claims. Accordingly, these claims must be denied.

In her Complaint, Complainant averred that on June 8, 2017, Respondent threatened to shut off her service and that a representative of Respondent threatened to terminate service by calling Complainant on a Saturday morning at 9:27 a.m. From a reading of the Complaint, it appeared that Complainant was asserting that the alleged conduct by Respondent or its agents constituted unreasonable service. At the hearing, Complainant offered no evidence to support such a claim.

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<sup>69</sup> Tr. 291-292; Respondent Exhibit 21.

<sup>70</sup> 66 Pa.C.S. § 316; *Kossmann v. Pa. Pub. Util. Comm'n*, 694 A.2d 1147 (Pa.Cmwlth. 1997); and *Stiteler v. Bell Telephone Co. of Pennsylvania*, 379 A.2d 339 (Pa.Cmwlth. 1977). Tr. 290.

As previously stated, 66 Pa.C.S. § 1501 provides that every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Section 56.333 of the Commission's regulations requires "personal contact" prior to termination of service. 52 Pa.Code § 56.333.

Complainant offered no evidence to establish that the proposed action or proposed termination by Respondent or its representatives constituted a violation of the 66 Pa.C.S. § 1501 requirement that a utility company provide its customers with safe and reasonable service and facilities. Accordingly, Complainant has failed to carry her burden of proof that Penelec's alleged actions or proposed actions constituted unreasonable service. As such, Complainant's claim must be dismissed

### Conclusion

Based on the record evidence, Complainant has not made a *prima facie* case that Act 129 does not mandate the installation of a smart meter and that smart meter technology creates privacy and safety concerns, that the proposed smart meter installation poses a safety issue, or that the service-related claims or threats of termination constitute unreasonable service. Establishing a *prima facie* case requires either evidence sufficient to make a finding of fact permissible or evidence to create a presumption against an opponent, which, if not met, results in an obligatory decision for the proponent.<sup>71</sup> Furthermore, Complainant's unsubstantiated testimony is insufficient to support a finding that Penelec's installation of a smart meter is not mandated by the Code, or that the smart technology utilized by Penelec creates privacy and safety concerns in violation of the Code or its Commission-approved Smart Meter Deployment Plan. In addition, Complainant has not made a *prima facie* case that the alleged actions and

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<sup>71</sup> *In re: Fink's Estate*, 343 Pa. 65, 74, 21 A.2d 883, 888-889 (1941); *Rodgers v. United States*, 66 F. Supp. 663, 667 (E.D. Pa. 1946) (relying, in relevant part, on *Roseberry v. Home Life Insurance Company*, 120 Pa. Super. 450, 454, 183 A. 121 (1936), also available at, 95 A.L.R. 749.

proposed actions by Respondent constitute unsafe or unreasonable service under 66 Pa.C.S. § 1501.

For all of the aforementioned reasons, the Complaint will be dismissed for failure to prove by a preponderance of evidence the claims asserted by Complainant, as set forth herein.

### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter in this proceeding. 52 Pa.C.S. § 331; 66 Pa.C.S. §§ 102, 107, 1501, 701.

2. Under Section 332(a) of the Pennsylvania Public Utility Code, the proponent of a rule or order has the burden of proof. 66 Pa.C.S. § 332(a). It is well established that “[a] litigant’s burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible.” *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n*, 578 A.2d 600, 602 (Pa.Cmwlth. 1990).

3. The preponderance of evidence standard requires proof by a greater weight of the evidence. *Commonwealth v. Williams*, 557 Pa. 207, 732 A.2d 1167 (1999). This standard is satisfied by presenting evidence that makes the existence of a contested fact more likely than its nonexistence. *Brown v. Commonwealth*, 940 A.2d 610, 614 n.14 (Pa.Cmwlth. 2008) (citation omitted).

4. In AMI meter-related matters, the Commission has held that “[t]he Complainant will have the burden of proof during the proceeding to demonstrate, by a preponderance of the evidence, that [the utility] is responsible or accountable for the problem described in the Complaint.” *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064, p. 18 (Order entered Sept. 3, 2015).

5. Section 701 of the Public Utility Code provides that “any person . . . having an interest in the subject matter . . . may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission.” 66 Pa.C.S. § 701.

6. The Commission has exclusive jurisdiction to adjudicate “issues involving the reasonableness, adequacy, and sufficiency” of a public utility’s facilities and services. See *Elkin v. Bell of Pa.*, 420 A.2d 371, 374 (Pa. 1980) (citations omitted).

7. When presented with a challenge to an AMI meter installation, the Commission has pronounced that “[t]he ALJ’s role . . . will be to determine based on the record in this particular case, whether there is sufficient evidence to support a finding that Complainant was adversely affected by the smart meter or whether [the utility’s] use of a smart meter will constitute unsafe or unreasonable service in violation of Section 1501 under the circumstances in this case.” *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064, p. 23 (Order entered Jan. 28, 2016) (citation omitted).

8. To satisfy her burden of proof, Complainant must demonstrate that the utility violated the Public Utility Code or a regulation or order of the Commission. 66 Pa.C.S. § 701. This must be shown by a preponderance of the evidence. *Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. PUC 196 (1990).

9. Upon the presentation by Complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence, sometimes called the burden of persuasion, to rebut the evidence of Complainant shifts to Respondent. If the evidence presented by Respondent is of co-equal weight, Complainant has not satisfied the burden of proof. Complainant now has to provide some additional evidence to rebut the evidence of Respondent. *Burleson v. Pa. Pub. Util. Comm’n*, 443 A.2d 1373 (Pa.Cmwlt. 1982), *aff’d*, 501 Pa. 433, 461 A.2d 1234 (1983).

10. While the burden of persuasion may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. Pub. Util. Comm'n*, 768 A.2d 1217 (Pa.Cmwlth. 2001).

11. Assertions, personal opinions or perceptions do not constitute evidence. *Pennsylvania Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987).

12. A public utility is required to provide adequate, efficient, safe and reasonable service. 66 Pa.C.S. §§ 102 and 1501.

13. There is no provision in the Code, the Commission's regulations or orders that provides that an electric distribution customer may "opt out" of smart installation. *Povacz v. PECO Energy Company*, Docket No. C-2012-2317176 (Opinion and Order entered January 24, 2013).

14. Act 129 of 2008, 66 Pa. C.S. § 2806.1 *et seq.*, required electric distribution companies to file smart meter technology procurement and installation plans with the Commission for approval. 66 Pa.C.S. § 2807(f).

15. A utility may issue written notice of termination to a customer if a customer does not permit access to meters, service connections or other property of the public utility for the purpose of replacement, maintenance, repair or meter reading, including the installation of an AMI meter. 66 Pa.C.S. § 1406(a)(4); 52 Pa.Code § 56.81(3).

16. Complainant has failed to carry her burden of proof establishing that Penelec violated the Public Utility Code or a regulation or order of the Commission in requiring installation of a smart meter at Complainant's property. 66 Pa.C.S. § 332.

17. Complainant has failed to carry her burden of proof establishing that Penelec provided unsafe or unreasonable service in violation of 66 Pa.C.S. § 1501.

